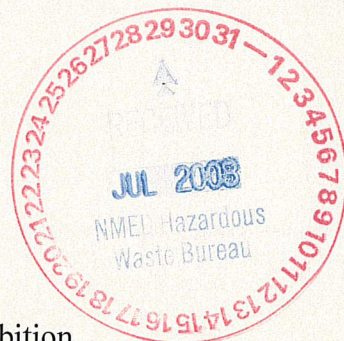


SOUTHWEST RESEARCH AND INFORMATION CENTER

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July 28, 2003

Steve Zappe
New Mexico Environment Department
2905 Rodeo Park Drive, Building 1
Santa Fe, NM 87505



RE: Class 2 WIPP Modification Request to Revise PCB Prohibition

Dear Steve,

Southwest Research and Information Center (SRIC) requests that NMED deny the permit modification because it is incomplete and does not adequately protect human health and the environment. Regulations under the New Mexico Hazardous Waste Act ((HWA) 20 NMAC 4.1.900, incorporating 40 CFR 270.42(b)(7)) provide that NMED may deny a Class 2 modification request.

SRIC is well aware of the May 15, 2003 decision of the Environmental Protection Agency (EPA) that the permittees use as the basis for the modification request. SRIC submitted comments to the EPA on January 24, 2003 (a copy was provided to NMED at that time). As the EPA response to those comments indicates, several of SRIC's comments resulted in changes that were made in the final approval. Attachment 1.

Nonetheless, EPA's approval does not eliminate the necessity for the permittees to have a permit modification approved by NMED, and NMED's authority and the requirements of the permit must apply to any and all waste, including containers with PCBs that are stored or disposed at WIPP. Any assertion to the contrary by the permittees should be rejected by NMED.

EPA also recognizes that PCB items cannot be stored or disposed at WIPP except in compliance with the WIPP permit. The EPA approval requires compliance with Modules I, II, III, and IV of the WIPP permit. Condition IV.B.6. The PCB closure plan must comply with the WIPP permit closure requirements. Condition V.A.2. Post-closure care must comply with the WIPP permit. Condition V.C.2. The permittees must comply with all permits, specifically including the WIPP permit. Condition VI.B. In addition, several other provisions of the proposed EPA approval were changed because they were inconsistent with the requirements of the WIPP permit. Attachment 1, Comments #5, 6, and 8.

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Nonetheless, the modification request includes various provisions that are not consistent with the permit (and the EPA approval, in at least one case). The request also includes changes to the permit that are inappropriate and cannot be approved by NMED.

1. The language proposed in the request to change the PCB prohibition is inappropriate and must be rejected by NMED. The permittees propose to change the PCB prohibition in Module II.C.3.f; Section B-1c; and Table B6-1, 12a to: "PCBs under an EPA disposal authorization." Such language is inappropriately broad as it could allow any subsequent EPA approval regarding PCBs to go into effect without the necessity of another modification request and NMED's approval. Any future PCB approval for remote-handled (RH)-PCB waste, for the Centralized Confirmation Facility, for increasing storage capacities, or other changes must also be subject to NMED approval through a modification process. The proposed language does not require such a future modification process. Any change in the PCB prohibition must specify that it relates only to the May 15, 2003 EPA disposal authorization and is valid for the 5-year term of that approval.

2. The proposed change in the WIPP Waste Information System (WWIS) must be rejected. The permit modification request includes deletion of the "PCB concentration" required Data Field in the WWIS. Table B-6, page B-9. Such a change is inappropriate and should not be approved by NMED. Containers with PCBs and other contaminants do pose a threat to public health and the environment and data about the presence of PCBs in any containers that are to be stored or disposed at WIPP must be included in the WWIS. If specific containers of waste with unlimited amounts of PCBs are to be allowed at WIPP, information about the PCBs and other materials required to be documented must be included in the WWIS in order to ensure that adequate information related to public health and the environment is readily available to NMED.

In addition, such the proposed change also is not consistent with EPA's Condition of Approval D.4, which requires: "All PCB Items must be identified in the WIPP Waste Information System to show the date of waste certification for disposal." The proposed modification would eliminate the required identification of PCB items, which is not consistent with EPA requirements or those of the permit.

3. The need for the modification has not been established. Regulations under the New Mexico Hazardous Waste Act (20.4.1.900 NMAC (incorporating 40 CFR 270.42(b)(1)(iii))) require the permittees to explain why the modification is needed. The permittees explanation on pages 2-4 contains assorted facts, assertions, irrelevant statements, and erroneous materials that do not explain or establish why the modification is needed. One reason cited -- "There are no other disposal options for PCB/TRU waste in the DOE complex" -- could be a significant reason, but gives an erroneous and misleading impression that all PCB/TRU waste would be disposed at WIPP. Not all PCB/TRU wastes could come to WIPP even if this modification request is approved. Clearly, RH-PCB/TRU waste is prohibited. Clearly, liquid PCB/TRU waste is prohibited. SRIC believes that additional PCB/TRU waste may also not be allowed at WIPP because of their container size, characterization problems with the containers or waste form, not being defense waste or other characteristics. Thus, the "reason" is inaccurate because all existing

PCB/TRU waste cannot be disposed at WIPP, and the fact that an additional disposal facility is needed for those wastes does not establish the need for some PCB/TRU waste to come to WIPP. The request also is incomplete because it does not include a comprehensive inventory of all PCB/TRU waste so that the proportion of such waste that might be disposed of at WIPP cannot be determined. Apparently, no such inventory was included in the March 22, 2002 application to the EPA (see the application on the WIPP website at http://www.wipp.carlsbad.nm.us/rcradox/final/02-3196_PCB_Initial_3-19-02_4-29-02.pdf). Neither was such an inventory included in the Baseline Inventory Report included in the WIPP Permit application.

Other proffered "reasons" do not explain the need. That PCBs are regulated under the Toxic Substances Control Act does not establish a need. That EPA issued its approval does not establish a need, since there are other existing and possible disposal facilities. That permittees have discussed PCBs in various public forums does not establish that the modification is needed.

4. The permittees have not demonstrated that highly concentrated PCBs are compatible with all other waste, backfill, seal and panel closure materials, container and packaging materials, shipping container materials. Thus, the request is not complete and is not adequately supported technically to show compliance with all aspects of 40 CFR 264 and other applicable requirements, as is required by 40 CFR 270.42(b)(7)(ii).

On pages 2 and 4 of the request, permittees assert that PCBs are compatible. But they provide no evidence to demonstrate such a fact. Instead, the request states that "EPA Region 6 considered ... compatibility of PCBs with other waste and backfill material.... Page 4. That statement is not supported by the EPA approval, which does not indicate that EPA did any study of PCB compatibility with all other wastes and materials at WIPP. The DOE's March 22, 2002 application to EPA includes only one paragraph on chemical compatibility. Page 24 of 44. The paragraph includes the assertion that a "review" has been conducted. But that review apparently was not attached to the application and it has not been included in the modification request. The application also includes the statement: "Changes to the types of wastes being received will be reviewed for compatibility prior to acceptance at WIPP." Id. Such a statement could be contradictory to the assertion that there are no incompatibilities, and does not establish any procedure to ensure that such additional review is completed and is technically adequate. Thus, the modification request regarding this important issue is not technically adequate or complete.

5. No adequate public process has been followed, and under the New Mexico HWA, a public hearing is required before any PCB modification request can be approved. The HWA provides that no "major modification" shall be approved "without an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA §74-4-4.2.H. SRIC believes that allowing storage and disposal at WIPP of unlimited quantities of PCBs, as provided in the modification request, is a major modification and that an opportunity for a public hearing is required. Such an opportunity has not been provided.

The permittees devote almost a page and a half of their 4-page overview of the request to describing "public participation" presumably regarding this request. None of the listed events was a public hearing. However, the significant number of stakeholders participating in those events (the list of which does not include SRIC, which has a significant interest in the request) also indicates that even if NMED does not consider the modification to be major, that there is "significant public interest" such that a public hearing is required under NMSA §74-4-4.2.I.

In summary, SRIC requests that NMED deny the request because it is incomplete and does not protect human health and the environment. A public hearing must be held on any modification to allow unlimited amounts of PCBs to be stored or disposed at WIPP.

Thank you very much for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Don Hancock".

Don Hancock



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAY 15 2003

Mr. Don Hancock
Southwest Research and Information Center
P.O. Box 4524
Albuquerque, NM 87106

Dear Mr. Hancock:

We are in receipt of your letter of January 24, 2003, in which you commented on the U.S. Environmental Protection Agency's (EPA's) proposed approval to the Waste Isolation Pilot Plant (WIPP) located at Carlsbad, New Mexico to land dispose of polychlorinated biphenyls (PCBs). After consideration of the public comments received during the 45-day comment period, we have revised some of the conditions in the final PCB disposal approval to the WIPP. We have enclosed a copy of the final approval for your information, and we want to thank you for your participation in this process. Our response to your comments is as follows:

Comment #1: Inadequate public notice

"As an initial matter, SRIC notes that the notice process is seriously deficient. For example, your public notice in the Albuquerque Journal was published in the legal notices on page D9. To our knowledge, none of the other various public notices that EPA has made related to WIPP over the past several years has exclusively used the legal notices. As a result of your faulty notice process, many people interested in WIPP, including dozens that have been involved in previous EPA public comment processes related to WIPP, were not noticed by EPA of the PCB proposal. EPA officials who deal with WIPP in Washington, DC could inform you about better and more appropriate public notice procedures. EPA Region 6 should also have consulted with citizen groups in New Mexico, including SRIC, about a more appropriate public notice process."

Response #1:

The EPA was aware of the public interest in this facility, and in order to ensure that EPA reached a wider public audience in New Mexico, EPA published a Public Notice of the proposed WIPP approval in the Albuquerque Journal and the Santa Fe New Mexican as well as the local Carlsbad Current-Argus. It is common practice for EPA to publish public notices for proposed PCB approvals in the legal section of local newspapers. After publication, EPA gave a 45-day comment period which provided any interested parties the opportunity to review the proposal and to provide comments.

In addition to publishing notice of the proposal in the State's three largest newspapers, EPA provided copies of the proposal and the administrative record to public libraries in Albuquerque, Carlsbad, and Santa Fe so that the public could review it free of charge.

Although 40 C.F.R. Part 761 of TSCA does not contain a public participation section, and, thus, there are no proscribed regulatory requirements to notify the public of a TSCA proposed approval issued pursuant to 40 C.F.R. § 761.75, EPA is committed to full public participation and believes strongly that the public should have input into the permitting and approval process under 40 C.F.R. Part 761. It is our national policy to provide notice and opportunity to comment. (See April 11, 1995 letter from Lynn R. Goldman, Assistant Administrator.)

Comment #2: What is the draft administrative record?

"The public notice mentions a "draft administrative record" available at Region 6 in Dallas and in New Mexico libraries that handle the EPA WIPP Docket. From discussions with Zimmerman Library staff in Albuquerque, the "draft administrative record" is the fact sheet, draft approval letter, and proposed Conditions of Approval. EPA should have specified what is in that "draft administrative record" so that interested parties would know whether there are additional materials than those otherwise available -- the DOE proposal and the few EPA documents."

Response #2:

In the Public Notice, the draft administrative record is explained to contain, "...all documents relating to the proposed approval (including data submitted by the applicants)..." This data included the DOE proposal and supporting documents. We apologize if the term "draft" caused any confusion. The Notice referred the public to the administrative record which supported the proposed approval. We included a contact person, telephone number, and e-mail address in the event that anything in the Notice needed further clarification.

Comment #3: Inadequate definition of "TRU waste"

"Proposed Condition of Approval II.A.1 has a definition of TRU waste that is consistent with the legal definition of TRU waste contained in the WIPP Land Withdrawal Act ("WIPP Act"), Sec. 2(18). However, the proposed condition does not include another important statutory requirement -- the limitations on TRU waste contained in Section 7(a) of the WIPP Act. That law prohibits TRU waste from being received at WIPP if it has a surface dose rate in excess of 1,000 rems per hour. Section 7(a)(1)(A). The law also places limits on the amount of remote-handled (RH) waste with a surface dose rate in excess of 100 rems per hour. Section 7(a)(1)(B). The law also limits the maximum activity level of RH waste and the total curies that RH wastes can contain. Section 7(a)(2). SRIC believes that there should be no approval of any kind at this time for any type of RH waste, so we strongly request that RH waste be specifically eliminated

from approval for any PCB items at WIPP. If EPA does not delete its conditional approval for RH PCB waste, it must include as conditions those limitations on RH waste from the WIPP Act."

Response #3:

The PCB approval does not approve the disposal of RH waste. The conditional approval language means that, in the future, EPA may or may not approve the disposal of RH waste after more information is received from the WIPP. Any modification of the final approval that would include approval to dispose of RH PCB/TRU waste would be public noticed for comment. The TRU waste definition is consistent with the TRU waste definition used in the Land Withdrawal Act, the RCRA permit, and the Compliance Certification. This action only approves the disposal of PCB contaminated TRU waste that meets the requirements currently specified in the RCRA Part B permit.

Comment #4: PCB Disposal cannot be allowed in Panel 1 at WIPP

"Proposed Condition of Approval II.B. allows disposal in PCB items in Panel 1. No such condition is appropriate, and it should be removed from any approval. In DOE's Initial Report (DOE/WIPP 01-3196) it stated: "Panel 1 is expected to be filled by January 2003." Based on that statement and the current EPA approval timeframe, there is no justification to approve use of Panel 1 for PCB items. On January 16, 2003, a DOE official stated that he expects to complete disposal in the rooms of Panel 1 that it intends to use by March 15, 2003. (Attachment 1). Regardless of the timeframe for EPA Region 6 approval of PCBs, no such approval will be granted by the New Mexico Environment Department ("NMED") prior to March 15, 2003. Nor is DOE currently intending to bring any PCB waste to WIPP by March 15, 2003. Thus, it is inappropriate to allow any disposal of PCB items in Panel 1. SRIC requests that any approval of PCB items for disposal at WIPP should be limited to Panel 2."

Response #4:

We have modified the final approval to authorize the use of Panel 2. We have also approved Panel 3 in the approval with the condition that the WIPP must verify that Panel 3 was constructed in accordance with approved plans and specifications before PCB/TRU waste may be disposed there.

Comment #5: Inadequate identification of PCB items in the WIPP database

"Proposed Condition of Approval III.D.4 requires that all PCB items be identified "in an electronic database." That designation is inadequate because the WIPP permit issued by NMED requires that information about all wastes intended for WIPP must be included in the WIPP Waste Information System ("WWIS") database. Module II.C.1.g; Section B-4b(1)(i). The DOE Initial Report also cites the WWIS and the requirements of Modules 1 and 2 of the WIPP permit. The lack of specificity about the electronic database could allow the permittees to use a different

database for PCB information, contrary to the requirements of the WIPP permit. Indeed, proposed Condition of Approval IV.B.7 states that PCB management and disposal must be consistent with the requirements of Module III of the WIPP permit. [See SRIC's further comments on that proposed Condition below.] Proposed Condition of Approval VI.B also requires compliance with the WIPP permit. SRIC requests that any approval of PCB wastes at WIPP specify that all PCB items must be identified in the WWIS."

Response #5:

We have modified condition III. D. 4. to read, "All PCB Items must be identified in the WIPP Waste Information System to show the date of waste certification for disposal."

Comment #6: Inappropriate time limit for storage of PCB items

"Proposed Condition of Approval III.D.6 allows storage of PCB items "for up to 90 days" in the Parking Area and Waste Handling Building ("WHB"). Such a condition is contrary to the WIPP permit, which limits storage in the Parking Area to 59 days after the date that the Inner Containment Vessel ("ICV") was sealed. III.A.2.d. The WIPP permit also limits storage in the WHB to 60 days, except for derived waste, (none of which should include PCBs). It is inappropriate for EPA to approve storage time limits for PCBs that would violate requirements of the WIPP permit. Indeed, proposed Condition of Approval IV.B.7 states that PCB management and disposal must be consistent with the requirements of Module III of the WIPP permit. [See SRIC's further comments on that proposed Condition below.] Proposed Condition of Approval VI.B also requires compliance with the WIPP permit. SRIC requests that any approval of PCBs at WIPP limit such storage in the Parking Area to no more than 59 days after the ICV is sealed. Storage in the WHB should be for no more than 60 days."

Response #6:

We have revised condition III. D. 5. in the final approval to allow no more than 60 days of storage in the WHB or the Parking area.

Comment #7: Inappropriate storage area operating requirements for PCB items

"Proposed Condition of Approval III.E.1 allows storage of PCB items in a "DOT Type B Package" in the WHB. That condition is inappropriate and is in conflict with the requirements of the WIPP permit. The WIPP permit provides that waste storage in the WHB must be in 55-gallon drums, Standard waste box, Ten-drum overpack, 85-gallon drum or 100-gallon drum. III.A.1.a and III.C.1. SRIC requests that any approval of PCBs at WIPP limit such storage to containers approved in the WIPP permit. Indeed, proposed Condition of Approval IV.B.7 states that PCB management and disposal must be consistent with the requirements of Module III of the WIPP permit. [See SRIC's further comments on that proposed Condition below.] Proposed Condition of Approval VI.B also requires compliance with the WIPP permit."

Response #7:

The requirements for PCB disposal are distinct from those regulating the disposal of the RCRA regulated wastes referred to in the current WIPP permit. The proposed approval for TSCA regulated waste mandates adequate disposal methods for PCB/TRU and PCB/TRU mixed waste. Any references in the PCB approval to the Hazardous Waste Facility Permit (HWFP) are meant to reference standard policies and procedures that must be followed for the disposal of PCB/TRU and PCB/TRU mixed wastes. This was done in order to streamline the permit and not to create duplicate conditions.

Comment #8: Inappropriate deletion of requirements of the WIPP permit

"Proposed Condition of Approval IV.B.7 states that PCB management and disposal "must be consistent with ... Modules II, III, and IV" of the WIPP permit. SRIC believes and requests that any PCB approval require that management and disposal "must be in compliance with ... Modules I, II, III, and IV" of the WIPP permit. There is no reason to omit the requirements of Module I of the WIPP permit since that module contains various provisions relevant to all TRU wastes, including any with PCB items. Proposed Condition of Approval VI.B requires, among other things, compliance with the WIPP permit, including Module I. Proposed Condition of Approval I.3 requires compliance with WIPP permit Condition I.I. [There is an apparent typo as the Condition is listed as "I.1," which does not exist in the WIPP permit.]"

Response #8:

We have added Module I to the final approval condition IV. B. 7. Regarding condition VI. B., you are correct that "Condition I.1." was an error, and we have changed that citation to read "Module I. I."

Comment #9: Inadequate transport condition

"Proposed Condition of Approval VI.F.2 refers to DOT Type B shipping packages. However, the WIPP Act imposes an additional requirement -- any shipping container must satisfy Nuclear Regulatory Commission quality assurance requirements. Section 16(a)(2). SRIC requests that any approval of PCBs specifically include that legal requirement."

Response #9:

The purpose of this condition is to define what shipping containers are required for transport of PCB/TRU and PCB/TRU mixed waste, not to enforce Nuclear Regulatory Commission (NRC) quality assurance requirements.

Comment # 10: Inappropriate conditional approval of RH waste, central confirmation facility, and increased storage capacity

"The draft approval letter is unacceptably imprecise, but it appears to be providing the requested conditional approval for storage and disposal of RH TRU waste with PCBs, for the central confirmation facility at WIPP, and for an increase in maximum storage capacity in approved storage areas. SRIC strenuously objects to all of those approvals and requests that any approval of PCB items delete approval of any kind for those three measures. Instead, any approval of such activities should be dependent upon a further application by the permittees to EPA Region 6.

The permittees have withdrawn their permit modification request to NMED for the central confirmation facility (Attachment 2). Also, DOE has not submitted a storage capacity expansion modification to NMED. For both of those activities, it is inappropriate for EPA to give approval of any kind for something that is not even proposed.

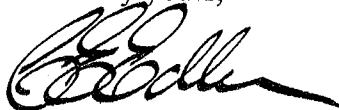
RH waste is subject to approval by both NMED and EPA Headquarters. SRIC believes that any consideration of PCB items in RH waste should be part of any future consideration by EPA of RH waste disposal."

Response #10:

We have revised the language in the final approval to make it clear that the approval does not grant WIPP the authority to dispose of RH PCB/TRU waste at this time. The purpose of the conditional approval is to let WIPP and interested parties know that EPA acknowledges the receipt of the request for RH waste approval, and is willing to review the details of the proposal at a future time if and when the WIPP decides to pursue that capability. If a request for RH PCB/TRU waste is proposed for approval at some future date, EPA will consider it a major modification that includes public notice before making a final decision.

I hope that we have addressed your concerns, and again thank you for your participation. If you have additional questions or comments, please contact Mr. James Sales of my staff at (214) 665-6796.

Sincerely yours,



Carl E. Edlund, P.E.
Director
Multimedia Planning
and Permitting Division

cc: Charles Lundstrom, NMED